MINUTES
HOUSE SELECT COMMITTEE ON CERTIFICATE OF NEED AND RELATED HOSPITAL ISSUES
Thursday, March 15, 2012
10:00 A.M.
Room 544 LOB

The House Select Committee on Certificate of Need and Related Hospital Issues met on Thursday, March 15, 2012 in Room 544 of the Legislative Office Building. Representatives Steen, Torbett, Alexander, Boles, Collins, Current, Glazier, Hollo, and Randleman attended. Representative Torbett presided.

Dr. Jonathan Christenbury made a presentation on Ophthalmic Procedure Rooms in Licensed Health Service Facilities (see attached and on committee website)

Rep. Collins: I'm all for lowering government intervention in your profession and every other profession and business, as well, if we exempted existing facilities from the CON procedures, but required of new ones, would that not, in effect, doesn't it favor the people who are already in the practice versus newer graduates and all, coming in from establishing their own facility.

Dr. Christenbury: You have to start somewhere, and if you want to extend that grandfather clause to allow more ophthalmologists, you are welcome to do that. I think that is wise to open more access to physicians using facilities or having them and also maybe decrease the number of procedures per room that are required to be certified.

Rep. Current: Let me take this opportunity to thank your profession, you have done some amazing things. I'm sitting here with 2 cornea grafts and I'm glad to be able to see you.

Dr. Christenbury: Was that outpatient.

Rep. Current: No this was inpatient at Presbyterian Hospital. Will this result in any type of cost shift in any way that would affect adversely the fact that hospitals are required to see anybody, does this play out in this are or not?

Dr. Christenbury: 20% of the procedures performed in North Carolina per year would just be the increase in the utilization of the services of the growth.

Rep. Current: When you get a letter from a hospital saying please keep CON, we don't want a free standing clinic to do diagnostic procedures because they will only see people with means and send the other people to the hospital. Is this a factor here?

Dr. Christenbury: I don't think so, because in my presentation I mentioned that we would take all payer schedules.

Rep. Boles: Even if they had no insurance could they come in and you give them the surgery?

Dr. Christenbury: Oh sure. That's why for several years now, I've performed 1000s of eye procedures in my office because people have no insurance, whether they are immigrants, legal or illegal aliens, they have such a high deductible, they would rather come to the office than go to the hospital or surgery center, that is why I started doing these procedures in the office several years ago. Some patients won't schedule the surgery if they have to go to the hospital because the copay is too high, 400 and something dollars so, there needs to be more access, either we do it in the office like the G.I. physicians some years ago, or pay more at different facilities or have less access.

Jan Paul, staff council gave presentation on Topics of Discussion (See attached and on committee website)

Drexdal Pratt: Effective January 1, 2012 the final agency decision portion of that has been removed as a result of Senate Bill 781.

Rep. Glazier: It seems to me that the expedited procedure sort of creates the fail safe mechanism where you need it and I'm wondering how often that expedited procedure is used, if it's not being used sufficiently, it would seem that if there is a time problem, the statute already creates an opportunity to expedite and can't see a need to change if that is not being utilized.

Craig Smith: Within the CON review, there is an expedited review process, that we try to get decisions out in 90 days and can extend to the additional 60 days as a regular where you can be extended only if we need substantial information. We use that procedure quite a bit. Often end up extending projects, but the extension of projects for substantial information avoids a denial of a project and then a contested case hearing to resolve the matter through settlement. I think it is a much more efficient process and that is one reason why we suggested broadening the scope of who is eligible for an expedited review. As far as any expedited process through OAH, none of our cases have gone through that process that I am aware. Probably because most of the cases that are on a settlement track will get resolved, if not quite as quickly, they will still get it resolved fairly straight forward and if it is a highly contested case, the parties are probably not willing to participate in such a procedure.

Rep. Torbett: Is there some way you could give us some type of rationality, is it effective, is it 1 out of 10 that go through that process is it 9 out of 10?

Craig Smith: It really varies. A lot of applications can get reviewed if they are fairly simple and straightforward in 90 days anyway. Part of it is a matter of workload. Some months we've had 1/3 to ½ requests it, most of which are granted. Once it gets above that, it gets a little difficult because the nature of our review calendar it can back up. A lot of folks don't request, but they hope they would get a decision sooner.

Rep. Torbett: Have you all prepared a list of what the department would recommend that would add to the people that are applicable to that process.

Craig Smith: We have just proposed either eliminating or raising the threshold, therefore allowing other facilities. We would still have the ability to schedule public hearings if we believed it was in the public interest or the public could request a hearing and right now those things keep us from having expedited reviews.

Rep. Torbett: Committee recommendations?

Rep. Glazier: I have a real problem with the elimination of stays, without a discussion of what the downside of doing that is.

Rep. Torbett: The committee did make a determination on raising the ceilings.

Jeff Horton: The law was changed to create stays a couple of years ago. We had a case where the CON was issued, a hospital actually was built, and by the time it came around to the court, the judge said, this case is kind of moot, because the place is already built. That is probably what would happen if you were to eliminate stays.

Craig Smith: That was not just the CON docket, we don't have that many appeals, I think she was saying that was the total appellate docket.

Rep. Glazier: Court of appeals issue ought to stay where it is headed. The Supreme Court likely would not be happy with getting a new charge of a direct appeal from the administrative process. We're the only state in the country that doesn't have a certification process, because our supreme court doesn't want the additional case load, so I don't think they would be happy with this. You've developed an expertise at the court of appeals level and you really would have to in these cases develop another sort of expertise.

Rep. Torbett: Is it the wish of the committee to put this on hold and get more study.

Rep. Alexander: Why don't we just leave it and not to anything to it?

Rep. Torbett: Recommendation of the committee? All agree.

Rep. Torbett: Bond requirements are the next issue.

Rep. Glazier: The bond originally gets set when the appeal is noted and really the appellate court has the capacity to raise or lower that bond at any time?

Jan Paul: The appeal bond is going to be set in the trial court. I don't know if they have the authority to modify a bond that was set by a separate tribunal.

Rep. Glazier: I would think it could be modified and they would know a whole lot more about it than we do, but if they don't have any authority, it may be a different issue.

Rep. Torbett: Can we get that answer?

Craig Smith: The specific point that your staff mentioned was that we had hoped that the language in 131E-188A1 talks about the proposed bond, and we just wanted the word each proposed project as opposed to the proposed project, there was a particular case in which one party filed one bond and was appealing for approvals. There are 2 different levels of bond, the bond for the OAH is set in that provision and then later on in B1-1, the same limits apply to the court of appeals, but the court of appeals does have the ability to raise the bond from a $50,000 maximum to a $300,000 maximum right now.

Rep. Glazier: A recommendation is that the bond requirement be made so that it applies to each proposed new institutional health service that is the subject of the petition.

Rep. Torbett: Unanimous by committee.

Rep. Collins: Having been involved in our legal system against my will in an estate case where multiple people kept trying to file suit to become beneficiaries of the estate and in effect those of us that won all the way up through the supreme court had to end up paying all the costs. I would like to see number one take place and also wonder if that wouldn't find of necessitate doing bullet point 3 under the section we just looked out.

Rep. Glazier: Do we have a sense of how many times it has been ruled that the appeal made in these cases has been deemed frivolous?

Craig Smith: I'm not aware of any.

Jeff Horton: Basically the issue comes as to the definition of affected persons and it is so broad in the current appeal language that I think a judge would be hard pressed to say a case is frivolous.

Rep. Collins: I would actually be for number one for that being the case for non-frivolous law suits.

Rep. Glazier: I think this creates a whole different economics of how you do these cases and whether cases would settle and how they would settle. I would get real concerned without getting some input from all the parties about opening that Pandora's Box.

Dr. Current: If an attorney was asked to handle it and he says I don't have any chance to win this and if I don't I'm going to have to pick up the tab, he would deem it frivolous, would he not.

Rep. Glazier: If there is a determination there has been a frivolous suit, that when a penalty is done, the provisions of the statute makes sure that that penalty is going to be strictly enforced, that would make sense to me.

Rep. Torbett: We are going to be looking at that in an effort to reduce that appeal process. We will put a hold on this. Too many parties have the ability to file an appeal.

Jeff Horton: The definition for appeals for effected persons. Effected persons can file appeals, the definition is very broad. If you were to narrow the definition of who can file an appeal, you probably would have fewer interveners and fewer parties to litigation which we think may be a move in a positive direction.

Drexdal Pratt: There are delays being created which fall back to this effected person definition.

Rep. Alexander: Too many parties, can you give a ball park number?

Jeff Horton: You have a party that didn't even apply for the need, and they'll file as an intervener. It has the appearance of just being a delay tactic.

Rep. Torbett: I'm going to ask Shawn that we get with the department for some language and bring it back to us. The appeals process is too lengthy.

Rep. Glazier: This applies to the ALJ process and the court of appeals. It would be a mistake to bypass the court of appeals without talking to the court and ALC about those issues. The ALJ can expedite?

Craig Smith: That is part of it. There will be 30-60 day cut out of going to the court of appeals. The other thing is, there are a number of cases, because of the complexity, that actually get pulled within the 270 day and get refiled. So the 270 day period can become a 540 day period.

Rep. Glazier: If the parties want it delayed, I don't know that it is our job to get mixed in with all of the parties' views.

Drexdal Pratt: We make the decision and it goes beyond that, we do receive a lot of complaints about that, but it is really in 150B and out of our jurisdiction.

Rep. Glazer: Could we have chief of ALJs over to talk about that.

Rep. Torbett: We will bump to back and get someone from ALJ to discuss. State Health Coordinating Council should be under state ethics.

Drexdal Pratt: The SHCC is an advisory group in development of this plan.

Rep. Glazier: When we were looking at legislation 2 years ago we brought up the issue of whether the SHCC and several other advisory groups ought to be added in. There are some real issues whether that could fundamentally alter not only the SHCC, but potentially take out people you want on the SHCC with expertise and knowledge just because the act doesn't neatly fit into how that group is selected.

Rep. Boles: Are these advisory boards compensated?

Drexdal Pratt: Just for expenses.

Rep. Alexander: They may be employed by a provider applying for CON. Do they remove themselves to not be a conflict of interest or is it really more generic.

Drexdal Pratt: Executive order 10 is read at every meeting. They do recuse themselves in those situations.

Rep. Torbett: When you were discussing these groups fall under the ethics act, was there any discussion of having a different layer within ethics that they would fall in?

Rep. Glazier: I don't recall we did the layer discussion. We did talk about the recusal rule.

Rep. Torbett: Recommendations from committee? We would have to bring in governor's liaison.

Rep. Alexander: You wouldn't just want to make the changes. There are numerous advisory committees. It wouldn't be fair just to site one council when others may have a different topic, but they act in the same.

Rep. Torbett: The difficulty is the expertise required to sit on such a board. Is this a leave alone?

Rep. Collins: My concern is if my institution is in a CON process, it's not really good enough for me just not to vote.

Rep. Current: I had the privilege of serving on the SHCC under Governor Martin. I don't know how he asked me to serve; I think it was because I worked for him politically. The question I would pose is, members of the SHCC, and if you wanted to get a room full of people with conflict of interest, you go to one of those meetings and you can find it. These different modalities that need beds appropriated, these organizations know who the good folk people are, and would it be appropriate to consider recommendations coming from, say if they need a dentist on there, that that recommendation would come from the medical board or dental society?

Rep. Glazier: We are talking about multiple things, it is important to keep the expertise but to make sure of the recusal process.

Rep. Boles: Do all the advisory boards take the basic ethics training?

Rep. Glazier: Any of the appointees on any board that are under the act do have the requirement for the training component.

Drexdal Pratt: We will get a copy of the provision that is given to the SHCC at each meeting for the next meeting.

Rep. Torbett: Appointing mechanism? We will leave until after we get further information.

Rep. Glazier: Don't understand determination of need made by the SHCC is outcome determinative?

Shawn Parker: We would need a proponent of this to explain the differences. It lays out the process in statute. There would be a need to change how they are to weigh their consideration.

Drexdal Pratt: The state medical facilities was under rules previously. That was changed in 1996. Those rules have remained on the books and as part of Executive Order 70 and SB 781, we've been cleaning up those things, and actually this morning at 10:00 a.m. those rules went before the rules review commission to be repealed. The reasons they were being repealed and the reason we stopped being a part of that, is that the process for getting rules in place, if you make the plan as part of the APA process, there is just not enough time to do an annual plan. It takes 4 ½ months to get a temporary rule in place.

Rep. Glazier: My recommendation would be that we don't go there, that we don't attempt to put this under the APA.

Rep. Torbett: Consensus on Rep. Glazier's recommendations? Yes.

Shawn Parker: There are a number of policy exceptions that are in the state medical facilities plan.

Drexdal Pratt: The AC3 allows them certain exemptions for equipment and things as part of research and part of their academic responsibilities. The hospital association working with the department and the SHCC worked through those issues and has come to an acceptable agreement that was actually in the 2012 plan. That resolution is in there; all parties were in agreement as far as I know. There is not an issue around AC3 as far as we are concerned.

Craig Smith: Most of the policies in the medical facilities plan are exemptions for specific types of facilities.

Rep. Collins: Does ECU get an exception to allow for that or make it easier for them to buy up hospitals than it would for an independent hospital group?

Drexdal Pratt: I personally don't think it has anything to do with who they purchase or develop management agreements with.

Craig Smith: The policy only applies to the actual teaching campus in Greenville and the policy is limited to what used to be called Pitt County Memorial Hospital, UNC Hospitals, Duke University Medical Center, and North Carolina Baptist Hospital in its current name.

Rep. Current: If you had a CON for a number of operating rooms for cardiovascular surgery, it the institution that has that commitment, does it have the authority to transfer those to some other entity at its own discretion or does it have to get approval to do that?

Craig Smith: No, relocation of operating rooms to another healthcare facility would require a CON.

Rep. Current: Has it always been that way?

Craig Smith: It has not always been that way and the development of open heart surgery was regulated specifically through the capitol cost as well as through the purchase of heart lung bypass machines, but the amendments adopted in the past decade have provided for stricter operating room regulation and the CON requirements that if you are moving it off campus other than across the street, then you need a CON.

Rep. Torbett: When was the last time the department reviewed?

Drexdal Pratt: The medical facilities plan is reviewed annually and we have several subcommittees as part of the SHCC that is part of the responsibilities for reviewing and getting feedback if we get petitions.

Rep. Steen: I think we need to keep this issue alive and keep it in the sunshine and keep it open.

Recess until 1:00 p.m.

Presentation on **CON law- Impacts on health care, economy, and overall well-being of the citizens of Harnett County**
Pat Cameron, Good Hope Hospital, Inc.
Jim Burgin, Harnett County Commissioner
Dr. Linda Robinson, Family Practitioner
Patsy Carson, Mayor of Erwin

(See attached and on committee website)

Rep. Torbett: I don't have any easy answers for you today. What I can promise you is that this committee will take your information and we'll get the questions you asked answered and we will definitely ask the department in charge of that and try to get down to some answers and perhaps even stumble upon a remedy.

Rep. Current: Since my legislative assistant is from Erwin, I've heard a little bit about this from time to time. You just about would be in favor of doing away with the whole CON process.

Jim Burgin: Based on our experience, there might be a value of the CON, but the rules need to be fair and have what I would say some common sense. Is it improving healthcare or is it protecting the people that already have their CON or have a service and that is the way it is being used.

Rep. Steen: I do have some information and I would like to ask that, I don't if we have got our handouts yet(See attached and on committee website), but I do have some things that we talked about from the COPA last time and it's just recommendations, they are not anything hard and fast, it's just some things that are out there and I want the committee to have that. They'll be some copies available to you soon. I would like to say as we move forward with the COPA issue, I know that we have made some type of advancement, I'll go over the quick recommendations and you all will get copies of these very soon. We talked about the buffer zone, I would like to continue to look at that and give us some input before our next meeting on that. The future CON applications and see how that would dove tail into the COPA issue. Extend physician caps- I think we need to talk about that a little bit more and see what we can come up with there with retired physicians and those kind of things. Recommend that COPA compliance reports be made annually to DHSR, if Chris Taylor is in the room, if we could get an update, I think there is some update on that, if he would let the committee know what's happened on that point, and I think it is a good thing.

Chris Taylor: We being the department and the department of justice are currently in discussions with Dixon-Hughes-Goodman to conduct a 5 year compliance audit on Mission's operations under the COPA. We have just initiated those discussions with Dixon-Hughes, so beyond saying that we have started the process, I can't report anything beyond that. Once the audit is done, obviously, it will be a public document and the reason we have selected Dixon-Hughes is they have been doing the independent work for us on the financial part of it for a number of years, so they are familiar with the COPA and familiar with Mission. They also do the audit on more healthcare facilities than any other accounting firm in the state and they have a significant healthcare practice. So we believe they would be the best firm to do that kind of work for us.

Rep. Steen: The COPA transition, I think we had talked earlier about PED looking at this. This is something I think we have to make sure that that is a scope of what PED can do. I hope it is

something they can do; just to make sure the audit process itself is proper in the way DHSR is doing that. I think that we will find out some things there. But we want to make sure from staff that that is a recommendation that this committee can make for PED to go in that direction. Typically they look at governmental operations, we want to make sure that this does tie into some type of governmental operation as they go forward and I think it does. A couple of other things, I would like to ask that both sides try to get together as far as Mission and Park Ridge, try to find, what is your common ground? I'm sure there is some common ground out there that you have. Try to find out what those are. Make a list, I know you've got differences, we've been there and seen that and we've taken a lot of input from both sides and I'd like to hear what you think the differences are moving forward. We do not want to do any harm to either side. We want to make sure that coming out of this COPA, if there is an exit strategy, how does that impact the other folks in that area, other than Mission. I think those are critical and I would like to see us work together if we can. It would be nice if you had a united front, and I know that is asking a lot, but if you had a united front coming back to us saying we disagree on these issues, how can we work them out? We may be able to work them out. We've been sitting here as judge and jury and it's kind of tough to do that and we'd like to go forward and I think with your input we can do that and I trust that you will make a best effort to do just that. So if that's ok with the committee, that's what I would like to recommend and you will get a list of these recommendations, like I say, nothing is in stone, but give us more input, give us more input as we try to wrap this thing up in the next meeting. I appreciate your attendance, comments, and notes and all the things that you have been providing so far and I hope that we can continue to work in a direction that will be beneficial for everybody.

Rep. Torbett: Wise words, the meeting was adjourned at 3:00 p.m.

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Representative John Torbett, presiding chair Viddia Torbett, committee clerk

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Representative Fred Steen, co-chair